STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

vs
JONATHAN DAVID HEWITT-EL,
also known as JONATHAN DAVID HEWITT
Defendant-Appellant.

Supreme Court
No. 155239

Court of Appeals No. 332946
Third Circuit Court No. 10-002907-01-FC
Hon. Bruce U. Morrow
(Prior interlocutory appeal: COA No. 330403)
(Appeal of right: COA No. 299241; MSC No. 143866)

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF AFTER MOAA GRANT ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider defendant's application for leave to appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF QUESTIONS

I.

Under MCR 6.508(D)(1) and the law-of-the-case doctrine, a trial court may not grant relief on grounds already decided against the defendant by a higher court in the same case. None of the claims which the trial court granted relief on in its latest opinion, though, were decided against defendant on direct appeal. Did the trial court abuse its discretion by considering these claims?

The People answer: "NO"
Defendant answers: "NO"

II.

An appellate court reviews de novo a trial court's application of the law to its factfinding, and is not bound by any factfindings which are clearly erroneous. Here, the trial court's factfindings were clearly erroneous and in turn so were its conclusions of law. Did the COA review de novo exactly what it was supposed to—the legal conclusions the trial court drew based on its clearly erroneous fact-finding?

The People answer: "YES"
Defendant answers: "NO"

III.

To merit relief under MCR 6.508(D)(3), a defendant must bear two burdens: (1) prove that but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, and (2) demonstrate either (a) good cause for failing to raise the grounds on direct appeal or (b) that he is actually innocent of the crime. Defendant did not carry any of these burdens. Did the trial court abuse its discretion in granting his motion for relief from judgment?

The People answer: "YES"
Defendant answers: "NO"

COUNTERSTATEMENT OF FACTS

Following a jury trial before the Hon. Bruce U. Morrow on May 17-18, 2010, defendant was convicted under an aiding-and-abetting theory of armed robbery,[1] assault with intent to do great bodily harm,[2] felon in possession (FIP),[3] and felony firearm.[4] He was sentenced to 14.25-25 years, 7-20 years, 3-10 years, and 2 years imprisonment, respectively. After his convictions were affirmed on direct appeal, defendant filed a motion for relief from judgment and, following a *Ginther* hearing, the trial court granted the motion and ordered a new trial. The Court of Appeals reversed the trial court, and defendant then filed the present application.

A. Summary of Incident and Trial.

The victim, James Lemon, testified defendant was one of two attackers, the other a man named Terry, who robbed and shot him after coming over to his house on February 14, 2010, ostensibly to get high and drunk. 58-59b.[5] Lemon had known defendant for about six to eight months before the attack, and thus knew who he was for purposes of unequivocally identifying him as one of the two assailants. 58b. Defendant had been to his house "several times." 58b.

Defendant called Lemon the morning of the attack and asked to come over with a friend to get high with "marijuana and drinking." 57b, 59b. Defendant arrived in the early afternoon with a friend he introduced as his brother, "Terry." 59-60b. Lemon had never met Terry. 59b. As the

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[1]MCL 750.529.

[2]MCL 750.84.

[3]MCL 750.224f.

[4]MCL 750.227b.

[5]Defendant's appendix will be referred to solely by its page number(s) followed by the letter "a." The People's appendix will be referred to by its page number(s) followed by the letter "b." Defendant did not include the trial transcript in his.

three sat talking, Terry suddenly pulled a gun, told Lemon to get on his knees, and stuck the gun in his face. 60b. Defendant demanded money, and Lemon gave him $600 he had in his pocket. 60-61b.[6] Lemon then told them to leave, and Terry slapped him in the head with the gun. 61b.

Meanwhile, defendant pulled duct tape out of his pocket and attempted to tape Lemon's arms together. 61-62b. Lemon managed to push away and break through the picture window. As he did so, he heard defendant say, "shoot the motherfucker," and then heard two shots. 62b. As Lemon ran across the street, the two men followed him out of the broken window (Lemon had earlier deadbolted his front door). "[T]hey came out the [broken living room picture] window behind me because the deadbolt was on the [front door] lock. And so, they couldn't get out the door because I had the door locked."[7] 63b. The two men then escaped in a car. 63b. After escaping to a neighbor's house (who called the police for him) Lemon realized he had been shot in the abdomen. 62-63b, 31-32b. The injury required the removal of half of his intestines. 65b.

When the police arrived soon after the shooting, *Lemon immediately identified defendant and his friend Terry as the assailants*, and gave the police defendant's phone number. 66b, 89-90b. Responding Detroit Police Officer Jason Treece arrived to find Lemon "slumped over" on his front steps, bleeding, with a gunshot wound to his abdomen and his front window busted out. 86b. Treece confirmed that Lemon told him without hesitation that "John" (defendant) was one of the assailants. 89-90b. Treece described Lemon's account of the incident at the scene, and it matched the one Lemon gave at trial, except for the time of the incident. Treece, and his police report, indicated his arrival time at the scene was 12:35 pm, whereas Lemon had estimated at trial (and the

[6]Responding officer Jason Treece testified that Lemon told him that he told Terry he had no money. 249a, 95b.

[7]Lemon's intellectually disabled 26-year-old son was asleep upstairs; he did not witness the assault. 64-65b.

preliminary exam) that the incident occurred between 1-1:30 pm. 249a; 7b, 57b. Officer Danl Barnes interviewed Lemon at the hospital on February 17, 2010, and confirmed that Lemon told him "John" and "Terry" were the assailants, and that Lemon gave him defendant's phone number. 115-118b. Sergeant Todd Eby testified he showed Lemon a photo array after his release from the hospital and Lemon identified defendant as one of the assailants. 130b.

Defendant testified he met Lemon in 2008, when a person named Craig introduced defendant and Lemon over the phone. 142b. Craig was a mutual friend of Lemon's and defendant's fiancee, Sheila Jackson.[8] 142b. According to defendant, "I was introduced to Craig over the phone from my fiancee. Craig called because Mr. Lemon had called him and wanted to purchase some Vicodin." 148b. So Craig introduced Lemon to him so defendant could sell Lemon some Vicodin: "That was the purpose I was introduced to Mr. Lemon for" in 2008. 147b. Lemon contacted defendant in the summer of 2009 again looking for some Vicodin, so defendant introduced Lemon to Terry, who defendant called Steve. 146b.

Defendant claimed to have an alibi for February 14th, but did not identify or call any alibi witnesses at trial. He testified he was home alone, 35-40 minutes from Lemon's house, cooking dinner at the time of the assault: "…about 12:30, 12:00 or 12:30 is when I got up to start cooking dinner for my fiancee for Valentine's Day." 149b, 150b, 151b.[9] Defendant stated Jackson, whom he lived with, was earlier getting ready to go to church when Lemon called *him* about 10 am, looking to buy some Vicodin. 148-149b; 196b. Defendant told Lemon to call one of the "people I introduced him to." 148b. Defendant then started cooking dinner after Jackson left for church.

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[8]At trial, defendant attempted to distance himself from the phone number Lemon provided police, which was in his and Jackson's names. 134b, 170b.

[9]Defendant's trial testimony is not included in defendant's appendix.

149b. He stated he "was up preparing my food." 149b. When asked if "there was someone else there with you," he testified, "No. Nobody else was in my home. We stay together." 149-150b. Defendant claimed Lemon called him back at about 12:30 "to confirm that he had talked to the person he [Lemon] considered to be Terry," and that Terry was on his way over to Lemon's house. 149b.

Defendant asserted that Lemon identified him as one of the attackers because defendant introduced Lemon to Terry, and then would not reveal Terry's whereabouts to Lemon after Terry shot him. 152b, 155-156b. After the Feb. 14 incident, "I was given a call and asked about the whereabouts of the guy Terry and told that if I didn't give Mr. Lemon the full name and address of Terry, then he would hold me responsible, seeing I'm the one who introduced them." 155b. Defendant acknowledged that the alleged request and threat came "several days" after Lemon had already identified defendant (immediately, the day of the attack) to the responding officers. 155b. Further, defendant claimed the alleged threat came not from Lemon but from Craig. 155-156b. "Craig is the one who delivered the message because Craig is the one who introduced us."[10] 156b.

Defendant further testified that he had been in a car accident in November 2009 and had neck and spinal damage, and limited mobility as a result. 143-144b. He stated: "Well, it's hard for me to walk and to sit [] for long periods of time. [] I have back damage and spinal damage from what they say." 157b. At trial he had a crutch with him "because it's hard for me to walk and to get around." 144-145b. He had been under a doctor's care and also had gone to physical therapy. 145b.

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[10]Paradoxically, although defendant claimed at trial to have been threatened by Craig on behalf of Lemon after the attack, it was Lemon's house which was firebombed the night before his preliminary exam testimony. 31b-32b, 84b.

1. Defendant's motion to substitute counsel.

The trial court denied defendant's first-day-of-trial request to substitute his retained counsel, David Cross, after making a lengthy record regarding defendant's claims of ineffective assistance, and finding none were valid. 38-51b. Defendant claimed counsel did not contact his alleged alibi witnesses, who included his fiancee, Sheila Jackson, a woman named Kelly, and Craig. Defendant admitted Jackson was at work that day (that is, 5-17-2010), even though her fiancé faced capital felony charges and she supposedly could provide him with an alibi:

> THE COURT: Well, who are your witnesses?
>
> THE DEFENDANT: For one, my fiancee' is one of my witnesses.
>
> THE COURT: Okay. And her name is what?
>
> THE DEFENDANT: Sheila.
>
> THE COURT: Sheila what?
>
> THE DEFENDANT: Jackson
>
> THE COURT: Who else is your witness?
>
> THE DEFENDANT: Kelly. I don't know what Kelly's last name is.
>
> THE COURT: Do you know where Kelly stays?
>
> THE DEFENDANT: In Grosse Point.
>
> THE COURT: Does she have a phone number?
>
> THE DEFENDANT: Not that I have. I would have to call. And that's what I was trying to do. Because I just got some money to get on the phone to get her number so she could be reached.
>
> THE COURT: Where is Sheila today?

THE DEFENDANT: At work.

THE COURT: Didn't she know you were going to trial?

THE DEFENDANT: Well, yeah. She knew I was going to trial. Yeah. She did.

THE COURT: Okay. Did she call Mr. Cross?

THE DEFENDANT: Pardon me?

THE COURT: Did she ever call Mr. Cross?

THE DEFENDANT: I don't know. I don't think so. I'm not for sure. I don't know what all, what all–

THE COURT: (Interposing) But you talked with Sheila. And didn't you tell her, you need to call Mr. Cross and let him know this and that? Because you never called him because you didn't have no money and you've been talking to -- So, nobody's ever called Mr. Cross. And you only talked last week. And you have an alibi defense. Well, we'll deal with your defense when it gets here. [42b-43b.]

Defense counsel then explained to the trial court his reasons for not calling Jackson:

MR. CROSS [defense counsel]: Judge, for the record, if I might. I have known from the beginning that he [defendant] was not there. I have spoken with Sheila Jackson. And after that conversation, it was my impression that she would not be an alibi witness.

THE COURT: Okay. That takes care of Ms. Jackson.

MR. CROSS: I have been given other names. And my position has been that those persons either needed to contact me so that I can interview them to determine whether or not they would be alibi witnesses. And the one, it was the gentleman that, in spite of this – Well, first of all, he's not here. And in spite of his testimony, he would not be an alibi witness either. So, I have –

THE COURT: (Interposing) Made a determination that the information that Mr. Hewitt has provided you has not been beneficial to the –

MR. CROSS (Interposing) To the defense.

THE COURT: Defense that he wishes to advance.

MR. CROSS: That's correct. . . .[44b.]

Thus, the trial court expressly acknowledged it was a strategic decision by Cross to not pursue defendant's alleged alibi after determining the information defendant provided him would not benefit the defense.

2. Sentencing.

At sentencing,[11] defendant maintained his innocence and again raised his ineffective-assistance claims, arguing that because his attorney was never paid "a penny" he could not adequately defend him. 195b. The trial court allowed defendant to place all his concerns on the record, but ultimately did not find his argument persuasive on any of the points—the claims that his alibi witnesses were not contacted or presented,[12] that his medical records should have been admitted to show physical impossibility, that the phone records should have been admitted to prove Lemon called him first, not the other way around,[13] and that because his retained counsel (a family friend) had not been paid he would not work as diligently.[14]

The court observed that "there were a lot of efforts [by defense counsel] that came up zero." And defendant conceded, "I agree with you." 206b. The court acknowledged the credibility contest

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[11]There were two sentencing transcripts from June 4, 2010 because the parties took a break to check on something in the presentence investigation report.

[12]The court flatly rejected defendant's contention that Cross did not talk to any of his alibi witnesses: "Yes, sir, he did.….For the record, we gone through who he talked to and who would not call him back and we have gone through that extensively." 206b.

[13]The court responded, "I don't think it would have mattered." 204b. "You admitted he [Lemon] called, you called him. So I don't think the phone records personally would have amounted to a hill of beans if you're asking me." 205b.

[14]The court disagreed: "All depends who I'm working for. If I'm working for a family or friend, I'm going to work hard, my neighbor." 198b.

between Lemon and defendant, and pointed out to defendant, "the jury chose to believe Mr. Lemon instead of you, that's their choice.…They said by their verdict we are satisfied that the People met their burden of proof beyond a reasonable doubt." 207b.

Significantly, in raising his alibi claim again at sentencing, defendant mentioned only "Greg [sic, Craig]." 205b.[15] In his later MFRJ, he would claim that his son Leon and an acquaintance, Mark McCline, were both at his house during the incident time so defendant could install a radio in their vehicles. 288-289b, 300b, 302b. At sentencing, defendant mentioned Leon only in the context of the clothing discussion again, and did not mention that Leon or McCline should have been alibi witnesses, even though defendant stated his reason for speaking up at sentencing was, "I just wanted these things made a matter of record, *and the alibi witnesses as well*." 212b.

B. Appeal of Right.

The Court of Appeals (or "COA") affirmed defendant's convictions in an unpublished opinion[16] and denied his motion for reconsideration.[17] Defendant raised two issues on direct appeal: (1) the trial court abused its discretion in denying his motion for substitute counsel made on the first day of trial, and (2) counsel was ineffective for failing to (a) investigate and pursue defendant's alibi defense and call alibi witnesses and produce telephone records, (b) file a motion in limine to suppress defendant's prior convictions,(c) object to the admission of the number and nature of the convictions on cross-exam, and (d) request a limiting instruction regarding them.

The Court of Appeals ruled that the trial court's denial of substitute counsel was not an abuse of discretion because defendant did not show that the alleged alibi witnesses (Sheila Jackson, Kelly,

[15]Defendant vaguely mentioned "my fiance[e]", but not as an alibi witness. 206b.

[16]*People v Hewitt*, unpublished per curiam opinion of the Court of Appeals, issued September 15, 2011 (Docket No. 299241) (*Hewitt I*); 28a-32a.

[17]Court of Appeals Order dated October 31, 2011, Docket No. 299241.

and Craig) "could offer him an alibi,"[18] and therefore his claim that counsel should have contacted the alleged alibi witnesses was not a "bona fide dispute" with counsel.[19] The COA also found that defendant did not show that the "telephone records had any impeachment value…"[20]

Hewitt I further found there was no ineffective assistance of trial counsel, ruling that (1) trial counsel need not have objected to defendant's impeachment with prior convictions on cross-exam; the objection would have been futile since it was defense counsel who opened the door on direct exam, (2) on appeal defendant failed to address his contention that his prior convictions did not qualify for admission under MRE 609, and thus abandoned his argument that defense counsel should have filed a motion in limine to exclude them, and (3) a limiting instruction would have been improper because evidence of one prior conviction was admitted by stipulation for substantive purposes to support the FIP charge.[21]

Finally, *Hewitt I* concluded that, even if counsel had requested a limiting instruction, there was "no reasonable probability that the outcome of the trial would have been different" in light of the victim's "unwavering testimony" and "defendant's nonsensical testimony that even though Lemon identified him as one of the two robbers at the scene, [Lemon] subsequently threatened to falsely implicate defendant unless he disclosed Terry's whereabouts[.]"[22]

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[18]*Hewitt I*, unpub op at 3; 30a.

[19]*Hewitt I*, unpub op at 3-4; 30a-31a. With Kelly, for example, *Hewitt I* found defendant had not provided defense counsel a "way to contact Kelly to determine if she could provide defendant with an alibi," and with Sheila Jackson, "there is nothing to show that Jackson could support defendant's testimony that he was not at Lemon's house that afternoon." 30a.

[20]*Hewitt I*, unpub op at 3; 30a.

[21]The People do not agree with this legal finding (the parties stipulated that defendant had been convicted of a specified, but unidentified, felony, 137-138b), but do agree with the prejudice analysis and conclusion.

[22]*Hewitt I*, unpub op at 4; 31a.

This Court (or "MSC") denied defendant's pro per application for leave to appeal because it was "not persuaded that the questions presented should be reviewed by this Court."[23]

C. Defendant's Motion for Relief from Judgment.

Defendant filed a pro per motion for relief from judgment (MFRJ) in October 2012 with three supporting affidavits: defendant's, his son Leon's, and Sheila Jackson's.[24] In his affidavit defendant mentioned a new alibi witness *for the first time*—Mark McCline, without identifying what alibi McCline could offer him. 300b. Defendant also identified his son as an alibi witness for the first time, and Leon stated in his affidavit that he stopped by defendant's house abouty 12:30 pm on February 14th to have a radio installed in his truck. 302b. Sheila Jackson's unnotarized affidavit stated she "returned home from church at approximately 1:15-1:30 p.m. to find Johnathan and his son Leon outside our apartment building doing something to Leon's truck." 304b.

Defendant raised three issues in his MFRJ: Sufficiency of the evidence regarding his armed-robbery conviction, ineffective assistance of trial counsel ("trial-IAC"), and ineffective assistance of appellate counsel ("appellate-IAC"). In February 2014 the trial court ordered the People to respond.[25] In May 2014 the trial court denied the MFRJ as to defendant's sufficiency

[23]MSC Case No. 143866, Order dated December 28, 2011, at 490 Mich 974 (2011).

[24]Pro Per MFRJ attached at 243b-306b.

[25]Circuit court opinion and order dated 2-19-2014. The trial court later incorrectly stated the People did not file a response to the pro per motion. The People hand-delivered their response to the court on April 22, 2014, as reflected in the proof of service accompanying it.

claim and ordered an evidentiary (*Ginther*[26]) hearing limited to defendant's two IAC claims.[27] Before the *Ginther* hearing, SADO was appointed and filed a supplemental MFRJ on defendant's behalf[28] to which the People also responded.

1. Ginther hearing.

An evidentiary hearing was held on January 23, February 20, and February 25, 2015.[29] Defendant called the following witnesses:[30]

- Daniel Rust, original appellate counsel (1/23/15, 33a-62a.)
- Leon Hewitt, alibi witness (1/23/15, 63a-84a.)
- Dr. Dawit Teklehaimanot, defendant's doctor (2/20/15, 85a-100a.)
- Bejoice Thomas, defendant's physical therapist (2/20/15, 101a-107a.)
- David Cross, trial counsel (2/20/15, 108a-155a.)
- Mark McCline, alibi witness (2/20/15, 156a-173a.)
- Defendant (2/25/15, 174a-203a.)

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[26]*People v Ginther*, 390 Mich 436 (1973).

[27]309b-316b. The trial court expressly limited the scope of hearing to "the issues of ineffective assistance of trial and appellate counsel only." 315b. Thus, the People objected to a new issue SADO raised in its supplemental MFRJ, i.e., the sufficiency of the evidence as to the felon-in-possession charge, and the trial court did not further address this issue.

The last page of the 5-16-2014 opinion erroneously states that the MFRJ was *granted* as to the two IAC claims. 3135b. Only a hearing was granted. Thus, the newest circuit opinion erroneously states that in the 5-16-2014 order the trial court granted defendat's MFRJ "with regard to the issues of trial and appellate counsel's assistance[.]" 12a, n 2.

[28]SADO supplemental MFRJ attached at 322b-335b.

[29]The *Ginther* transcripts are attached in defendant's appendix.

[30]The People called no witnesses.

Summary of Ginther Testimony.

Cross was a family friend of defendant's and retained by his family, although he was never paid.[31] 124a, 174a. He lived next-door to defendant's brother, Robert, who asked him "to handle the arraignment for his brother, indicating that they were looking for an attorney for him." 124a. He was then asked to stay on for the preliminary examination. 124a. "I remained on the case kind of waiting for them to hire another attorney. They never did." 124a. He had "extensive" criminal defense experience (125a), and visited defendant in the Wayne County Jail (WCJ) several times to discuss his defense with him. 109a, 112a. Cross counseled defendant to plead guilty because his alibi witnesses were either not locatable, or, the one that was (Jackson), not credible. 125a, 127a. Cross explained that his impression of Jackson after speaking with her was that she would an uncooperative witness at best or, at worst, a liar:

> …Ms. Jackson, after my conversation with her, she was not going to be a good witness. As a matter of fact, if I recall, I think she even refused to testify. But I'm not sure about that. But I think she refused to testify. And my impression was that if she had, it was, there was a potential for perjury there. And I didn't, certainly didn't want to present that to the Court. [125a.]

At trial, he had given the same reason for not calling Jackson.[32] 44b. Cross was sure he did not choose to ignore or not investigate anything that may have been helpful to his client's defense. 128a. Cross recalled clearly that defendant gave him only three names for his alibi defense: one complete name (Jackson) and two other first names. 110a, 127a-128a. He did not hire an investigator because: "I had no idea what I would be investigating. I had two first names and absolutely nothing else." 111a. Cross recalled one name was Kelly, but had no way of contacting

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[31]Cross did not bring his trial file to the hearing because he was in the process of moving offices and could not locate it. 129a-130a.

[32]Defendant gave Rust Jackson's number but Rust "was never able to contact her. 34a.

her without a phone number or last name. 109a-111a.[33] Defendant never mentioned to Cross that his son Leon was an alibi witness. 128a. Further, while defendant told Cross about his car accident, Cross did not view defendant's physical condition as being relevant to an alibi. 113a. And Cross stated Leon "absolutely" did not tell him he wanted to testify for his father. 112a, 141a. Appellate counsel Daniel Rust testified defendant identified two alibi witnesses, Jackson and "possibly his son" Leon. 34a-35a. Rust testified he raised only the most viable issues because he believed the Court of Appeals preferred appellate counsel to raise only those arguments which were soundly based on the law and the facts of the case. 39a, 41a-42a. Rust asked defendant if he had any more alibi witnesses, and defendant "indicated he only had those two." 35a. As far as Leon, defendant "never gave [Rust] an address or a phone number to contact him." 34a. As did Cross, Rust testified that defendant never mentioned Mark McCline, and Rust could not assess the validity of an alibi witness whose name was never given to him. 38a, 43a.

At trial Cross had elicited from defendant that he had "been previously convicted of crimes here in" Michigan, and was in prison for those crimes for nineteen years. 142b. Then the prosecutor on cross-exam elicited from defendant that he had been convicted of 5 armed robberies. 153b-154b. Cross testified he did not file a motion to suppress the armed-robbery convictions, believing they would have been admitted under MRE 609 because they contained an element of theft.[34] 118a, 146a. It was also part of his strategy to elicit damaging testimony first on direct exam rather than waiting for it to be elicited on cross-exam. 146a.

Mark McCline testified at the hearing that he arrived at defendant's house between 12-12:30 on Feb. 14th to have defendant install a car radio in his wife's car. 157a. McCline stated that as he

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[33]Mark McCline's wife's name was also Kelly; they were different women apparently. 191a.

[34]MRE 609 is attached at 356b.

and defendant were at the car, with defendant inside it, Leon arrived and walked up to them, and defendant introduced his son. 158a-159a, 160a-161a. Leon then leaned into McCline's car to chat with his father as the latter installed the radio. 161a. Leon testified that he arrived at defendant's a "little after 1 pm" to have his father install a radio in his truck. 65a. When he arrived defendant was upstairs; defendant then came down to work on Leon's truck. 65a. A while later defendant told him that Jackson had just pulled up; Leon did not see her, and he saw no one else either. 65a-66a.

McCline testified that Jackson called him several times after defendant was arrested to tell him he would be needed as an alibi witness, and to keep him apprised of the case status. 166a, 168a, 170a. Even though he knew defendant had been arrested and faced criminal charges and that he could offer helpful testimony, McCline never contacted the police or prosecutor's office to inform them he was with defendant the day of the incident. 166a-167a, 171a-172a.

Leon did not contact the police, or show up at defendant's trial that first day when defendant was claiming his alibi witnesses had not been contacted.[35] 78a-79a; 41b-44b. When shown his alibi affidavit at the *Ginther* hearing, Leon conceded he did not provide the information in it to the police:

> Q: All right. So, here's a clear alibi that proves your dad is innocent, is that correct?
>
> A: I don't know if it proves--
>
> Q: (Interposing) Would you agree the facts--
>
> A: (Interposing) His innocence, but it's an alibi. Yes.

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[35]Leon vacillated about whether he was at trial (71a, 72a), but he was clearly not there on May 17, 2010. 37b. Leon also claimed Sheila Jackson was at trial with him, but, again, she was not there on May 17, 2010; she was in fact at work that day, when her fiancé faced capital felony charges. 71-72a; 42b-44b. "Well, yeah. She knew I was going to trial. Yeah. She did." 43b.

> Q: I'm sorry.
>
> A: Yes.
>
> Q: Would you agree the facts in this alibi make it impossible for your dad to have committed the crime he was convicted of? Would you agree?
>
> A: Yes.
>
> Q: And you didn't approach the police with this?
>
> A: No. [78a-79a.]

When Leon went to visit defendant in prison afterward, Leon did not discuss the alibi either, and just made small-talk about other things, even though he believed his testimony could have exculpated his father. 74a, 75a. Defendant told Leon that he had given appellate counsel Leon's name, but defendant did not give Leon Rust's name or number. 74a, 75a. Likewise, Leon testified he did not later ask his father for Rust's contact information when Rust failed to contact him, even though Leon knew he was a vital alibi witness. 74a, 75a.

At the *Ginther* hearing, defendant could not explain why he did not mention Leon or McCline's names as alibi witnesses at the beginning of trial when discussing this very issue with the court, why his family did not try to find them for trial, and why no effort was made to locate Sheila Jackson for the *Ginther* hearing:

> Q: [APA]: Okay. So, in the beginning of trial on May 17th, you asked this Court to replace your counsel. Do you remember that?
>
> A: [Defendant]: Yes.
>
> Q: And part of the discussions about why you wanted a new attorney is that he wasn't contacting the witnesses that you wanted him to, correct? Yes or no?
>
> A: Yes.

Q: Do you remember mentioning – You mentioned Sheila Jackson's name. Would you agree with that?

A: Yes. I believe I mentioned her name.

Q: And you mentioned Kelly's name on the record at that point, correct?

A: Yes.

Q: And you mentioned a person named Craig, correct?

A: Yes.

Q: Those are the three names you mentioned?

A: Yes.

Q: And now you're claiming that you were home installing a radio in Mark McCline's car. Why didn't you mention Mark McCline's name that day?

A: Well, that day, it was, I was going through a whole bunch. I was trying to get the Judge to understand that our trial strategies were not matching up. And I just didn't mention the names.

Q: Okay. And you also didn't mention your son Leon's name as an alibi witness, even though he was there while you were installing the radio, correct?

A: Correct.

Q: So, you're on trial for your life facing life in prison and you can't find the phone numbers or the contact information for these witnesses, correct?

A: Correct.

Q: And your family knows you weren't at the scene of the crime and that you were installing a radio, correct?

A: Yes.

Q: And your father didn't go hire an investigator to find the names and phone numbers of these alibi witnesses?

A: No. He didn't.

Q: Okay. An he also wasn't paying your attorney, correct?

A: Right.

Q: So, Sheila Jackson was your fiancee at the time?

A: Yes.

Q: And according to Mr. McCline, she called him repeatedly saying we're gonna need your help at trial, right?

A: That's what he testified to.

Q: And then she also began calling his wife Kelly and saying the same thing, we're gonna need your help at trial at some point, correct?

A: That's what he testified to. Yes.

Q: Why isn't Sheila Jackson here today testifying on your behalf or at this proceeding?

A: Because I can't find – First of all, I can't find Mrs. Jackson. We have not been together for years.

Q: Did you ask your appellate counsel to subpoena her?

A: Yes. At the time, I did.

Q: For this [*Ginther*] proceeding, did you ask your appellate counsel to subpoena Sheila Jackson?

A: No. I didn't ask her to subpoena Sheila Jackson. [191-193a.]

Likewise, at the *Ginther* hearing, defendant had no explanation for why testified he was home alone without mentioning either Leon or McCline:

Q: [APA:] And when you mentioned at trial on page 96 that you were upstairs fixing this elaborate Valentine's Day dinner for Sheila, it didn't occur to you to mention, and I was running up and down between the fifth floor and the ground floor installing a radio at the same time, that didn't occur to you to say that?

A: Well, I wasn't running.

Q: So, you didn't think it was important to mention that, correct?

A: No. [190a.]

Defendant finally explained who Kelly was at the *Ginther* hearing. She was a friend of a neighbor in defendant's apartment building. Defendant apparently saw her as she was leaving the building after visiting her friend: "I saw her and I waved and she kept going. I assume she was visiting somebody. But that's the only way I knew her….I knew she stayed in Grosse Pointe because I was flirting with her. So, that was it." 176a.

The following table ("alibi table") summarizes the facts surrounding the alleged alibi witnesses throughout the circuit court proceedings.

Alleged alibi witnesses ➜	**Sheila Jackson**	**Kelly**	**Craig**	**Leon Hewitt**	**Mark McCline**
1. Alleged alibi testimony *Key for abbreviations: "*Af*"=*witness's affidavit* "*G*"=*Ginther testimony*. "*T*"=*trial testimony* "*D*"=*Def's testimony (T, G)* "D"=*Defendant*	*Af*: She was supposedly home with D before and after church. When she got back from church, Leon and D were there and she spoke to them briefly. 304b *Cf. D's trial testimony in box 6.* 148b.	*D's G*: She was a friend of a neighbor of D's who was visiting the neighbor. D first said he met her briefly one time. He waved, introduced himself, and flirted with her. (Explained for first time at *Ginther*) 176a: He then claimed he had met her as she came out of the building "on a couple occasions and we talked.…" 190a.	*D's T*: None. He supposedly relayed to D a threat from Lemon if D did not reveal whereabouts of Terry. 152b. Lemon testified on cross-exam that Craig was a neighbor of his. 81-82b.	*Af :* He came to D's house on Feb. 14th to have D install a radio in his truck. 302b. *G:*Same. 65a. *D's G:* Same. D did not complete the installation. 180a.	*G*: He came to D's house on Feb. 14th to have D install a radio in his wife's car. 157a. *D's G:* Same. 186a

Alleged alibi witnesses ➡	**Sheila Jackson**	**Kelly**	**Craig**	**Leon Hewitt**	**Mark McCline**
2. Who did witness say he/she saw at D's house on Feb. 14th?	*Af:* She saw Leon and defendant. "I spoke to them briefly." 304b. She also stated she told Cross about others who "could clear Johnathan of these charges: Leon, Craig and Kelly." She did not mention McCline. 305b.	N/A	N/A	*Af:* He saw defendant, and then Sheila Jackson, who arrived 15-20 min. later. She "came over to see what we were doing….". 302b. *G:* D told him that Jackson had just pulled up, but Leon didn't see her. 66a. He saw no one else, and did not mention McCline. 65-66a.	*G:* D was at home, and then his son arrived and stood with McCline and D as D installed the car radio. 158a, 160-161a. McCline did not see Sheila Jackson. 159a.
3. When did witness allegedly arrive at D's home on Feb. 14th?	*Af:* 1:15-1:30 pm. Leon and D were there working on L's truck. 304b. *D's Af:* does not say. 299-301b. *D's T:* D did not say she returned from church. 148b. *D's G:* He did not say she returned, and only mentioned Leon and McCline. 180a.	N/A	N/A	*Af:* "a little after" 1 pm. 302b.	*G:* 12:15-12:30 pm. 158a, 163a. *D's Af:* Did not mention McCline's alibi, just his name. 300b. *D's G:* "12:00-ish," "12:30, 12:35… " 187a.
4. When did witness allegedly leave D's home on Feb. 14th?	*Af:* 11 am for church. D was at home. 305b. *D's T:* D did not say when Jackson left for church. 148b.	N/A	N/A	*Af:* about 3 pm. 302-303b. *G:*a little after 2 pm. 65a. *Jackson's Af:* about 2:30-3 pm. 304b. *D's Af:* 3 pm. 300b. *D's G:* "between 2:00, 2:00 and 3:00 or between 1:30 or 2:30, between 2:00 and 3:00." 180a.	*G:* About 1:15 pm. 164a.

Alleged alibi witnesses ➜	**Sheila Jackson**	**Kelly**	**Craig**	**Leon Hewitt**	**Mark McCline**
5. Did D mention her/him as an alibi witness at the motion to substitute counsel?	Yes. 42b.	Yes. 42-43b.	Yes. 44b, 47b.	No. [Cross mentioned that he could not reach D's son to have him bring his father trial clothing. 37b.]	No.
6. Did D mention witness in his trial testimony as an alibi witness for Feb. 14th?	D stated Jackson was home at about 10 am and then left sometime after that for church. *He did not mention that she returned.* He implied she heard Lemon call him at 10 am before she left. 148b.	No.	*Not an alibi*, but D stated that Craig relayed the threat from Lemon. 152b, 155-156b.	No.	No.
7. Did D mention her/him as an alibi witness when arguing alibi issue at sentencing?	No. D mentions "my fiancé" in context of phone records. 196b.	No.	*Not as an alibi*, but to explain why Lemon was framing him, that is, for introducing Lemon to Terry. 197b.	No. [And D mentioned Leon in context of trial clothing issue, stating that at some point during trial Leon had been "sitting there." 206b.]	No.
8. Did D mention witness in his appeal of right?	Yes. 232b.	No.	No.	No.	No.
9. Did D mention witness in his pro per MFRJ in Oct. 2012?	Yes, with attached affidavit. 286b, 290b, 304b.	Yes, under "other names" of alibi witnesses. 290b.	Yes, under "other names" of alibi witnesses. 290b.	Yes, with attached affidavit. 288-289b, 290b, 302b. [D slyly contended that Leon was the "gentleman" his counsel discussed at the trial motion hearing. 288b. Not so. 37b, 44b, 47b.]	*Not in the brief.* Only in D's affidavit, with no details. 300b, ¶ 8. ***This is the first time McCline's name appears anywhere in the record.***

Alleged alibi witnesses →	Sheila Jackson	Kelly	Craig	Leon Hewitt	Mark McCline
10. Did SADO mentionwitness in its Supp. MFRJ, in raising alibi issue and stating, "had [D's] defense witnesses been presented the result of the trial would have been different"? 324b.	No.	No.	No.	No.	No.
11. Was witness called at MFRJ *Ginther* hearing?	No.	No.	No.	Yes. 1-23-15. 63-84a.	Yes. 2-20-15. 156-173a.

At the *Ginther* hearing defendant also called his doctor, Dawit Teklehaimanot ("Dr.T"), who testified that defendant reported being in a car accident in late 2009. 86a, 88a. Defendant complained of severe lower back pain and shooting pain up his spine and down his leg, and had difficulty standing and bending. 86a. Dr. T diagnosed him as having lumbar radiculopathy, prescribed pain medication, and imposed physical restrictions to continue until March 2010. 88-89a. Dr. T did not remember defendant using a wheelchair or crutches at his appointments, and probably would have recorded this if he had. 92-93a. Similarly, he made no notation that defendant was unable to walk, and this is something he would have noted in the records. 94-95a.

Dr. T opined that defendant would have been able to get his legs over a one-to-two foot obstacle, and had not restricted defendant from such movements. 96a-97a. When asked whether "jumping out a window and falling four feet" would have been extremely painful, the doctor responded that he did not have an MRI report "on this patient."[36] 97a. The doctor had ordered an

[36]Looking at the photo of the window, the four-foot distance was closer to the actual distance from the window sill to the ground than the one-to-two foot hypothetical. 307b.

MRI but defendant never had it done. 94a. Based on the doctor's examination of defendant, though, he opined that "if in fact, he has what we call radiculopathy and if he jumped off the, the window it is very possible it will hurt." 97a.

Defendant's physical therapist, Bejoice Thomas, testified that Dr. T referred defendant to him for treatment following the 2009 car accident. 102a. Defendant complained of whiplash to his neck, and pain in the lower-back region. 102-103a. Thomas restricted defendant from doing repetitive motions and heavy lifting. 103a. Defendant was able to walk into the office for his appointments with no assistive device, and had no step restrictions. He could have walked up a few steps. 104-105a. Thomas's records noted defendant had a "painful gait," but Thomas was not aware of any restriction defendant had regarding lifting his legs. 106-107a. Significantly, Thomas opined that, if urgent, defendant could have dove over a barrier several feet tall. 107-108a.

Finally, Thomas's medical records reflect that defendant steadily and continually improved, and he maintained significant range of motion (ROM) in his extremities despite being in moderate to severe pain. On December 7, 2009 he had 80% ROM in his upper extremities and 75% in his lower extremities. He had no assistive device and could walk 100 feet. 248a. On December 18, 2009, defendant had the same ROM, and Thomas noted that defendant's "pain has decreased in the neck and low back today since last treatment." 246a. On December 23, 2009, Thomas wrote that defendant said "he is able to tolerate more pressure along the spine and that the discomfort isn't as bad when pressure is applied in those areas like before." Thomas noted the progress as: "Decreased tenderness along the spine compared to previous visit status." 244a. On February 10, 2010 defendant felt "less stiff and painful." 236a. On February 19, 2010, five days after the assault, defendant told Thomas "his back muscles don't feel as fatigued and tired as quickly" and he was "able to raise his legs up higher compared to earlier." 234a.

3. Trial court and COA rulings on defendant's MFRJ.

The trial court issued an opinion on November 3, 2015 harshly criticizing trial counsel and granting defendant a new trial "based on the ineffective assistance of Mr. David Cross, trial counsel." 336b-353b. The trial court made no findings as to Rust. The opinion did not apply the governing court rule, MCR 6.508. The People filed an interlocutory application for leave to appeal and the Court of Appeals, in lieu of granting leave, vacated the 11-3-2015 order and remanded the case for the trial court to reconsider defendant's motion applying the proper standards "under MCR 6.500 et seq."[37] The COA did not retain jurisdiction.

On April 25, 2016, the trial court again granted defendant's MFRJ, this time finding appellate counsel was ineffective for not properly raising the issue of trial counsel's failure to seek to suppress the prior convictions. The trial court also found trial counsel ineffective for failing to investigate and call Mark McCline, and call Dr. T and Bejoice Thomas to buttress defendant's claim of physical impossibility.[38] The COA granted the People's second interlocutory application for leave to appeal on June 7, 2016, then reversed the granting of defendant's MFRJ.[39] The Court of Appeals found that "several of defendant's claims were decided against defendant in a prior appeal."[40]

Specifically, *Hewitt II* found that in rejecting defendant's claim on direct appeal that the trial court erred in denying his first-day-of-trial motion to substitute counsel because counsel failed to pursue his alibi defense, *Hewitt I* necessarily had to determine whether alibi witness Sheila

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[37]COA Docket No. 330403, Order dated December 21, 2015.

[38]The 4-25-2016 opinion is attached at 12-18a.

[39]*People v Hewitt-El*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2016 (Docket No. 332946) (*Hewitt II*), attached at 19a-27a.

[40]*Hewitt II*, unpub op at 4; 22a.

Jackson could have offered a bona fide defense.[41] The *Hewitt II* Court acknowledged that *Hewitt I* had not considered the proposed alibi testimony of McCline and Leon. 22a. The *Hewitt II* Court found it had considered the issue regarding the admission of defendant's prior convictions in *Hewitt I*, in the context of defendant's argument that counsel should have requested a limiting instruction.[42] 22a.

Defendant sought leave to appeal from *Hewitt II*, and this Court granted a MOAA, ordering the parties to address the following three issues in sequential supplemental briefing:

> [W]hether: (1) the defendant's alleged grounds for relief were decided against him on direct appeal; (2) the Court of Appeals failed to defer to the Wayne Circuit Court's credibility determinations; and (3) the defendant has established entitlement to relief under MCR 6.508(D).[43]

Defendant filed his supplemental brief and the People now respond.

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[41]This is the People's position too.

[42]The People agree with the COA's prejudice, but not legal, analysis.

[43]*People v Hewitt-El*, 501 Mich 873 (2017) (order dated September 29, 2017); 1b.

INTRODUCTION

> *The trial is the main event at which a defendant's rights are to be determined…and not simply a tryout on the road to appellate review….*[44]

Defendant had a chance at trial—the main event—to identify the alibi witnesses he *now* claims were crucial to his defense—Mark McCline and his son Leon. He chose not to identify them as alibi witnesses at trial even though, if his alibi is to be believed, he was aware of them three months earlier. To believe him, this Court would also have to find that he told both trial and appellate counsel about these two important witnesses and they chose to ignore them and then lie about it.

Putting aside all legal analyses, all standards of review, all burdens of proof, and sticking just to the facts—defendant's alibi simply does not ring true. The People have already proven their case in their statement of facts. Only after his convictions were affirmed on direct appeal did defendant recall that there were, actually, two more alibi witnesses. Two alibi witnesses he did not mention *once*, either by name or implication, as he moved for substitute counsel before trial, as he testified at trial with his freedom on the line and presented the first version of his alibi (where he was home *alone* cooking a Valentine's Day dinner), and as he again discussed—at length—his alibi and other concerns about his convictions at sentencing. Leon *was* mentioned at the motion to substitute counsel, but only by defense counsel to note that he had not been able to reach the son to get appropriate trial clothes for defendant. So, at the start of trial, defendant did not mention his son or McCline when the court asked him who his alibi witnesses were—and Leon, who

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[44] *Davila v Davis*, __ US __; 137 S Ct 2058, 2066 (2017) (internal quotations and citations omitted).

supposedly could exonerate his father, was nowhere to be found. These two alibi witnesses were also not mentioned on direct appeal.

Conversely, at the MFRJ *Ginther* hearing defendant did not call even one of the three witnesses he named during his motion to substitute counsel. These were people who were supposedly so crucial to his alibi defense that he deserved a new attorney who would find and call them at trial.

There are many other legal flaws and factual inconsistencies with defendant's arguments, as will be shown. So there was nothing done or omitted by either trial or appellate counsel that would have been reasonably likely to result in a different outcome if it had not occurred. Not in this case, under these facts, and in light of defendant's own "nonsensical" trial testimony about his alibi, why he claimed the victim was framing him, and his eleventh-hour attempt to drum up new alibi witnesses post-appeal. In granting relief, the trial court disregarded its own previous findings at trial regarding these same issues, and also failed to hold defendant to the "good cause/actual prejudice" requirements of MCR 6.508(D).

"The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not."[45] While collateral relief after a jury found guilt beyond a reasonable doubt is, in rare instances, warranted, this is not one of those cases. The Court of Appeals correctly found the trial court abused its discretion in granting the MFRJ; defendant's application should be denied, and the central role of trials preserved.

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[45] *Davila*, 137 S Ct at 2066.

ARGUMENT

I.

Under MCR 6.508(D)(1) and the law-of-the-case doctrine, a trial court may not grant relief on grounds already decided against the defendant by a higher court in the same case. None of the claims which the trial court granted relief on in its latest opinion, though, were decided against defendant on direct appeal. The trial court did not abuse its discretion by considering these claims.

Standard of Review

The proper interpretation of a court rule is a question of law which is reviewed de novo.[46] Whether the law-of-the-case doctrine applies is also a question of law which is reviewed de novo.[47]

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion.[48] A trial court abuses its discretion when it makes an error of law.[49]

Discussion

Under MCR 6.508(D)(1) and the law-of-the-case doctrine, a trial court may not grant relief on grounds already decided against defendant by a higher court in the same case.[50] None of the claims which the trial court granted relief on, though, were decided against defendant on direct appeal.[51] The trial court did not abuse its discretion by considering these claims.

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[46]*People v Swain*, 288 Mich App 609, 629 (2010).

[47]*Duncan v Michigan*, 300 Mich App 176, 188 (2013).

[48]*Swain*, 288 Mich App at 628.

[49]*Swain*, 288 Mich App at 628-629.

[50]*People v Herrera*, 204 Mich App 333, 340 (1994); *People v Mitchell*, 231 Mich App 335, 340 (1998); *People v White*, 307 Mich App 425, 428-429 (2014).

[51]The People do not waive their objection to the trial court considering those grounds which were decided against defendant on direct appeal, such as the value of the three alibi claims (Sheila Jackson, Kelly, and Craig). Further, the People still contend that in addressing the substitution of counsel issue, the *Hewitt I* Court necessarily conducted an analysis which would equally apply to

What the People address in issue I is the narrow question this Court posed, that is, whether defendant's alleged grounds for relief were decided against him on direct appeal.[52] In answering that question, the People will respond only to those claims for which the trial court granted relief, because those grounds are what *Hewitt II* reviewed: (1) IAC of appellate counsel for failing to adequately address the MRE 609/suppression issue, thus establishing good cause for defendant not raising it on direct appeal, and actual prejudice, and (2) failure of trial counsel to move to suppress the convictions, and to call Mark McCline, defendant's doctor, and the physcial therapist. To the extent defendant alleged other grounds for relief in his pro per and supplemental MFRJs which the trial court did not address, they were rejected and are not before this Court.

A. Not decided on direct appeal: Trial-IAC alleged failure to move to suppress the prior convictions, and appellate-IAC alleged failure to adequately address the claim on appeal.

The *Hewitt I* Court concluded that defendant on direct appeal had not addressed the merits of the MRE-609 suppression issue and thus deemed the issue abandoned.[53] The People agree the *Hewitt II* Court erred in concluding this issue had nonetheless been addressed in *Hewitt I* when the latter Court addressed the limiting instruction issue. The admission of evidence is a distinct issue from whether, after that evidence is admitted, it warranted a limiting instruction. Therefore, the

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an IAC claim regarding those same alibi witnesses.

[52]Defendant relies extensively on *Sanders v US*, 373 US 1; 83 S Ct 1068 (1963), which has not been cited by one Michigan case—published or unpublished. Moreover, *Sanders* has "been largely superceded by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996…" *Ellis v US*, 593 Fed Appx 894, 896 (2014).

[53]It is puzzling why the *Hewitt I* Court found that appellate counsel had "not addressed the merits" of defendant's argument that his prior convictions would not have qualified for admission under MRE 609 and thus trial counsel had been ineffective for not making a motion in limine to exclude them. Appellate counsel on direct appeal *did* address the merits of this issue, arguing that given the similarity of the prior convictions to one of the charges defendant faced (armed robbery), had trial counsel made the motion in limine the trial court would have most likely found their prejudicial effect outweighed their probative value. 238b-240b.

People agree the trial court could consider the IAC/MRE-609 admission issue, and the People will address the substance of that claim in issue III.

B. Not decided on direct appeal: Trial and appellate IAC alleged failure to investigate and call alibi witness McCline and to raise it on direct appeal.

The People agree with the *Hewitt II* Court that defendant's IAC claims that counsel failed to call Mark McCline and Leon as alibi witnesses, and then failed to raise the issue on direct appeal, were not directly addressed in *Hewitt I*. 22a. Thus, the trial court could consider this claim.[54] Since the trial court did not even mention Leon or find he was a valuable alibi witness in its April 2016 ruling, the claim as to him is not before this Court.

[54]Defendant, though, tripped over both the good-cause and actual-prejudice hurdles and thus *relief* was not warranted, as discussed in issue III.

II.

An appellate court reviews de novo a trial court's application of the law to its factfinding, and is not bound by any factfindings which are clearly erroneous. Here, the trial court's factfindings were clearly erroneous and in turn so were its conclusions of law. The COA reviewed de novo exactly what it was supposed to—the incorrect legal conclusions the trial court drew based on its clearly erroneous fact-finding.

Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion.[55] A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law.[56] The trial court's findings of facts supporting its decision are reviewed for clear error.[57] Special deference is given to a trial court's findings when based on witness credibility.[58]

Discussion

The COA reviewd de novo exactly what it was supposed to—the legal conclusions the trial court drew based on its fact-finding. It was also allowed to review the trial court's factual findings for clear error, and a complete review of the record confirms it correctly found there were clear errors.

The *Hewitt II* Court did not "fail" to do anything it was supposed to. It was the trial court which ignored the jury's credibility determinations. It ignored the trial testimony and the pre-*Ginther* record in general, as if the *Ginther* hearing somehow trumped them all in importance and

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[55]*People v Swain*, 288 Mich App 609, 628 (2010).

[56]*Swain*, 288 Mich App at 628-629.

[57]*Swain*, 288 Mich App at 628.

[58]*People v Sherman-Huffman*, 241 Mich App 264, 267 (2000); *People v Sexton (After Remand)*, 461 Mich 746, 752 (2000).

weight. *Hewitt II* did not reject the trial court's factual findings out of hand; it rejected those findings which were clearly erroneous, which was its prerogative as the reviewing court.[59] The entire record must be considered in evaluating the trial court's factfindings and conclusions of law, and in turn whether the *Hewitt II* Court was appropriately deferential to the trial court's credibility determinations.

Defendant failed to attach or discuss any portion of the trial transcript.[60] It is extremely telling that the party seeking relief did not deem the victim's, defendant's, or any other witness's trial testimony relevant to his application. Ironically, defendant accuses the People and the *Hewitt II* Court of "myopically considering only the evidence at trial, which consisted of Mr. Lemmon's [sic] testimony[,]" while it is he who asks this Court to be short-sighted and consider only the *Ginther* evidence.[61] Defendant avoids any comparison between the *Ginther* hearing, the trial testimony, and the affidavits filed with defendant's pro per MFRJ.

Aside from what this omission says about the merits of defendant's claims (that they fail if the entire record is considered), the omission also underscores exactly what our US Supreme Court warned against: "The trial is the main event at which a defendant's rights are to be

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[59]Moreover, defendant conflates the trial court's factfinding with its legal conclusions, and then criticizes the *Hewitt II* Court for not deferring to those erroneous legal conclusions. See *eg* Defenant's MOAA brief, p 17.

[60]For this reason alone, his arguments should be deemed unsupported and abandoned. In his statement of facts, he directs the reader to the statement of facts in his application, which is not only inconvenient for the reader but also not in compliance with this Court's appendices requirement. MCR 7.312(B)(1) states: "A party's statement of facts or counterstatement of facts shall provide the appendix page numbers of the transcript pages, pleadings, or other documents being cited or referred to." Defendant's application should be denied for the failure to comply with this important requirement. Simply put, if we have to do it, so should he.

[61]Defendant's MOAA brief, p 23. Further, Lemon's was *not* the only testimony at trial—defendant ignores his own, and understandably so, because it belies his current alibi claim. The trial testimony of the five other prosecution witnesses is attached in the People's Appendix.

determined…and not simply a tryout on the road to appellate review…."[62] Defendant would have this Court ignore the main event, because his claims do not withstand scrutiny when the trial—indeed everything leading up to his pro per MFRJ—is taken into account.[63]

The People will address in issue II only some of the trial court's glaringly erroneous factfindings and rulings.[64] First, it was clearly erroneous for the trial court to consider Sheila Jackson at all, but especially in assessing the value of Mark McCline: The court stated in its opinion: "Moreover, it appears Jackson's *testimony* that Defendant was at home during the time that the crime occurred would have been corroborated by McCline's testimony."[65] There were numerous clear errors in this analysis. Sheila Jackson never testified—anywhere. She was never even present in court—ever, for trial or the *Ginther* hearing. All the trial court had from her was an unsigned affidavit from March 2011.[66] 304b. Once defendant chose not to call Jackson at the *Ginther* hearing her affidavit was meaningless.[67] Next, turning to that unnotarized affidavit (even if it could be considered), Jackson had nothing to offer the defense. She stated she returned from church "at approximately 1:15-1:30 p.m.…" 304b. The record unequivocally establishes that the

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[62]*Davila v Davis*, __ US __; 137 S Ct 2058, 2066 (2017) (internal quotations and citations omitted).

[63]The index of the People's appendix provides a road map of the sequence of events and filings in this case. It reveals just how late in this case defendant decided to name McCline and Leon as alibi witnesses.

[64]The People consider issues II and III closely intertwined analytically and thus incorporate in issue II the factual inconsistencies discussed in issue III, where the inconsistencies in the defense witnesses' accounts are discussed.

[65]15a (emphasis added).

[66]It is tempting to resort to exclamation marks as the trial court did in its first opinion. 337b.

[67]An affidavit's purpose is to get the party "in the door" for a hearing. It is not a substitute for testimony, particularly when the hearing is granted.

incident occurred about 12:35 pm.[68] Her value as an alibi witness was put to rest at the hearing when (in addition to not being called) both Leon and McCline testified they did not see Jackson at defendant's. 128-129a, 159a. Finally, the *Hewitt I* Court had already ruled that Jackson had no value as an alibi witness, thus the trial court should not have been considering her anew.[69]

Second, it was clearly erroneous for the court to believe defendant's alibi and his alibi witnesses. Defendant's alibi was clearly fabricated. Lemon had no reason to falsely accuse defendant, and defendant's attempt to give him one made no sense.[70] Then, for the first time, defendant claimed post-appeal that he was not home alone cooking a Valentine's dinner (as he had testified at trial; 149-150b) but, instead, was cooking dinner and simultaneously installing two radios five floors down. At the hearing, defendant tried to reconcile his trial alibi with the *Ginther* testimony of Leon and McCline, by claiming what he (defendant) meant was that he was upstairs alone fixing the meal, and then McCline and his son arrived. 180a. In his affidavit defendant mentioned McCline as an alibi witness for the first time. 300b. Even then defendant did not

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[68]In claiming the crime occurred between 1:30 and 1:45 pm, defendant misstates the facts and ignores the police report attached to his appendix, which lists the time of the incident as 12:35 pm. 249a. Defendant's MOAA brief, p 7. See also, defendant's argument at 286b. It is irrelevant that Lemon may have been off in his recollection by one hour when he estimated that the incident occurred about 1:30 pm. 7b, 57b. The police report speaks for itself (249a), the 1:40 pm time on the evidence technician's photos do too (109-110b, 307b), since he arrived after other officers had already responded (100b). No one is arguing the incident did not happen. Officer Treece arrived to find Lemon "slumped over" on his front steps, bleeding, with a gunshot wound to his abdomen and his front window busted out. 86b.

[69]On this point the People's answer in issue I is "yes."

[70]Regarding defendant's attack on Lemon's credibility, it is irrelevant that Lemon may have told responding officer Treece that he did not turn over any money to either assailant (249a; 95b), and then told Officer Barnes, and testified at the preliminary exam and at trial, that he gave defendant $600 from his pocket. 250a, 9b, 61b. Juries are allowed to believe portions of a witness's testimony and disregard other, insignificant, parts. A reasonable jury could have concluded, for example, that Lemon was in shock (literally) from a gunshot wound and did not include this fact in his account to Treece as he awaited the ambulance which "rush[ed]" him to the hospital. 65b, 94b.

identify the nature of McCline's alibi. Defendant also for the first time claimed that his son Leon stopped by his house, also to have (coincidentally) a radio installed in his truck. 302b. That fact that defendant waited so long to identify witnesses he already knew about rendered his alibi unbelievable.

The accounts of Leon and McCline were also inconsistent with one another. Leon did not mention in his affidavit that while he was there he saw McCline, even though McCline testified Leon was at defendant's house while he was. 160-161a. And McCline testified he saw Leon at defendant's house, but did not mention that defendant was also installing a radio in Leon's truck. 156-173a. McCline also did not see Sheila Jackson at defendant's, even though Jackson stated in her affidavit she had returned home. 159a; 304b. There was no need for *Hewitt II* to delve very far into witness credibility, since the record itself showed the witnesses could not keep their stories straight. The trial court clearly erred in giving their alleged alibis so much weight.

III.

To merit relief under MCR 6.508(D)(3), a defendant must bear two burdens: (1) prove that but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, and (2) demonstrate either (a) good cause for failing to raise the grounds on direct appeal or (b) that he is actually innocent of the crime. Defendant did not carry any of these burdens. The trial court abused its discretion in granting his motion for relief from judgment.

Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion.[71] A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law.[72] The trial court's findings of facts supporting its decision are reviewed for clear error.[73]

Discussion

The trial court erred as a matter of law by ignoring the constraints of MCR 6.508(D)(3) and finding actual prejudice when there was none.

A. Ineffective assistance of counsel law.

A defendant alleging ineffective assistance must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there

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[71] *People v Swain*, 288 Mich App 609, 628 (2010).

[72] *Swain*, 288 Mich App at 628-629.

[73] *Swain*, 288 Mich App at 628.

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[74] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[75]

In evaluating prong one of the above *Pickens/Strickland* test, there is "a strong presumption of effective counsel when it comes to issues of trial strategy[,]"[76] and defendant "bears a heavy burden of proving otherwise."[77] The reviewing court "will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence."[78] "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."[79] Counsel "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[80] He is not required to advocate a meritless position[81] or argument,[82] and has wide latitude regarding trial strategy because calculated risks may be necessary to win difficult cases.[83] Finally, a defendant "who attacks the

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[74]*People v Pickens*, 446 Mich 298, 314 (1994), quoting *Strickland v Washington*, 466 US 668, 694 (1984).

[75]*Strickland*, 466 US at 694; *Pickens*, 446 Mich at 314.

[76]*People v Odom*, 276 Mich App 407, 415 (2007).

[77]*People v Rockey*, 237 Mich App 74, 76 (1999).

[78]*Odom*, 276 Mich App at 415.

[79]*Rockey*, 237 Mich App at 76.

[80]*Strickland*, 466 US at 690.

[81]*People v Snider*, 239 Mich App 393, 425 (2000).

[82]*People v Ericksen*, 288 Mich App 192, 201 (2010).

[83]*Odom*, 276 Mich App at 415; See also, *Pickens*, 446 Mich at 325.

adequacy of the representation he received at his trial must prove his claim."[84] In doing so, he must exclude reasonable hypotheses consistent with the view that his trial lawyer was effectively representing him.[85] Defendant has not done this.

B. Motions for relief from judgment.

Relief under subchapter 6.500 of the Michigan Court Rules is narrowly limited to only the most "egregious" cases in order to preserve the finality of judgments after a defendant has exhausted the appellate process.[86] MCR 6.508(D) states, first and foremost, that the "defendant has the burden of establishing entitlement to the relief requested." Pertinent to this appeal, the rule states the court "may not grant relief" if the motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence[.]"[87] If a defendant raises such an issue, he must show (a) "good cause" for failing to raise the issue on appeal, *and* (b) "actual prejudice" from the alleged irregularities.[88] For a conviction following trial the rule states "actual prejudice" means that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]"[89] The "exhaustion doctrine" embodied in MCR 6.508 "promotes the legitimate interest of this state in enhancing the accuracy, efficiency,

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[84]*Ginther*, 390 Mich at 442-443 (internal quotation omitted).

[85]*Ginther*, 390 Mich at 442-443.

[86]*People v Carpentier*, 446 Mich 19, 42 (1994)(Riley, J. concurring).

[87]MCR 6.508(D)(3); Rule attached at 354b.

[88]MCR 6.508(D)(3)(a) and (b). 354b. *People v Garrett*, 495 Mich 908 (2013); *People v Watroba*, 193 Mich App 124, 126 (1992).

[89]MCR 6.508(D)(3)(b)(I); 354b. The People submit that the "actual prejudice" prong is essentially the same as prong two of *Strickland*, that is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694.

and reliability of our own criminal process by assessing and resolving appellate issues shortly after trial."[90]

In *People v Garrett*,[91] this Court underscored how strictly it interprets the requirements of MCR 6.508(D). Defendant there also alleged his trial counsel failed "to call or investigate a critical alibi witness."[92] This Court affirmed the circuit court's denial of defendant's MFRJ in an order, finding "[t]o the extent defendant alleges grounds for relief which could have been raised on appeal," defendant was still not entitled to relief because he failed to demonstrate "good cause" for the failure to raise the grounds on appeal and "actual prejudice" resulting from the alleged errors.[93] As the defendant in *Garrett* did, defendant here failed to meet either the good cause or actual prejudice requirements for receiving relief from judgment on his new claims.

Defendant claims *Strickland* requires that this Court look at the cumulative effect of the alleged errors: "It would be improper for a reviewing court to separate ineffective assistance of trial counsel and other claims and dismiss them individually for failing to satisfy the prejudice

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[90]*People v Reed*, 449 Mich 375, 380 (1995).

More recently, in *People v Hobson*, 500 Mich 1005 (2017), this Court, in lieu of granting defendant leave to appeal from the trial court's denial of his MFRJ, had remanded to circuit court for a *Ginther* hearing, for the trial court to determine whether trial counsel was ineffective during plea negotiations. Hobson had 25 years earlier been found guilty of felony murder following a trial, after rejecting the prosecutor's plea offer. In a concurrence, Chief Justice Markman expressed concerns about the lack of a "reasonable time limitation" in which a defendant may bring an MFRJ, and the "current lack of finality in the judicial process." *Hobson*, 500 Mich at ___ ; slip order at 2.

[91]*People v Garrett*, 495 Mich 908 (2013).

[92]*Garrett*, 495 Mich at 908.

[93]*Garrett*, 495 Mich at 908. The *Garret* Court also found that defendant had not satisfied the court-rule requirements for previously raised claims either. *Garrett*, 495 Mich at 908.

inquiry."[94] Yet defendant completely ignores the "cumulative" record in this case, which, when viewed in its totality, clearly belies defendant's innocence claim.

C. The decision not to call alibi and medical witnesses was not error and did not result in actual prejudice.

The trial court clearly was result-oriented in finding that (1) trial counsel failed to investigate and produce alibi and medical witnesses, *and* (2) that the witnesses' testimony likely would have changed the outcome of the trial. The *Ginther* hearing was an effort to revive defendant's alibi with new, but still unbelievable, accounts of where he was and with whom. The hearing revealed nothing to bolster defendant's claims though. Indeed, rather than assisting defendant in proving his ineffective-assistance claims, it confirmed that defendant was lying and his alibi witnesses, had they been called at trial, would have too. And those were the two that defendant chose to produce at the hearing. Kelly, Craig, and Sheila Jackson were never produced, not even at the hearing where trial and appellate counsel were being faulted for not finding and calling them.

1. Trial counsel's efforts to locate alibi witnesses was objectively reasonable.

Cross's *Ginther* hearing testimony was consistent point-by-point with his explanations at the motion for substitute counsel explaining his efforts to investigate the alibi. Cross's account did not change; defendant's did. As the alibi table reflects (nos. 5-8), defendant never once mentioned at trial the additional alibi witnesses he now claims existed. 42b, 47b. At trial, counsel mentioned "a gentleman" who was not there, and "would not be an alibi witness either," anyway, and a few moments later defendant referred to this other person as Craig. 44b, 47b. As he concocted new alibis post-appeal, he stated it was his son, Leon. 288b. It was not believable, though, that Cross,

[94]Defendant's MOAA brief, p 25.

who had a few moments earlier referred to Leon as defendant's son, would then refer to him as an unnamed "gentleman." 3b, 44b.

Defendant admitted that his family had not hired an investigator themselves instead of waiting for Cross, whom they had not paid, to do it. 188a, 192-193a. Further, by his own admission defendant did not give Cross adequate contact information for his witnesses yet still somehow expected Cross to find them. 190a.

Also, defendant's claim that he was supposedly going back and forth between his fifth-floor apartment and the ground level, cooking a meal and simultaneously installing two radios in a car five floors below, all while having great difficulty walking, made no sense.[95] 181a, 186-187a, 189-190a. "I couldn't walk. . . .Walking was very hard." 181a.

2. Alibi witnesses Leon Hewitt and Mark McCline were of no value.

The inconsistencies in and between the testimony of defendant at trial and at the hearing, and that of Leon and McCline, proved the alibi to be concocted nonsense. At trial Leon was mentioned during the pre-trial discussions but never once as an alibi witness. 37b, 42b, 47-48b, 49b. Leon, knowing he was a vital exculpatory alibi witness, did not contact the police, or show up at defendant's trial the first day.[96] 78-79a; 41-44b. It makes no sense that a son who supposedly knew he was a vital alibi witness would neither show up for trial nor be reachable. Such behavior is in keeping with someone removed from the trial, who had no valuable role to play in it.

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[95]Even with an elevator. 80a.

[96]Leon vacillated about whether he was at trial (71a, 72a), but he was clearly not there on May 17, 2010. 37b. Leon also claimed Sheila Jackson was at trial with him, but, again, she was not there on May 17, 2010; she was in fact at work that day, when her fiancé faced capital felony charges and she supposedly could provide him with an alibi. 71-72a; 42-44b. "Well, yeah. She knew I was going to trial. Yeah. She did." 43b.

Leon testified at the hearing that he came over to defendant's house on 2/14/2010 at about 12:30 pm so his father could help him install a radio in his truck. 64-665a, 81a. As they were trying to install the radio, his father told him Sheila Jackson had just pulled up; he did not personally see her though. 65-66a. In Leon's affidavit, he stated he saw Sheila arrive home from church and that she came over to the two men "to see what we were doing before going in."[97]

Further, at the *Ginther* hearing Leon did not mention that he saw Mark McCline at his father's house. He never mentioned the person or name at all, either at the hearing or in his affidavit. A reasonable jury could have concluded this was because either he or McCline, or both, were lying about being at defendant's that day, at that time; thus their testimony would have been unhelpful at best and harmful at worst, even if they had been called at trial.

There were other inconsistencies. In sum, jumping to the prejudice prong, there is no reasonable likelihood that but for this error there would have been a different outcome, i.e., acquittal, because their accounts, considered either alone or cumulatively, did not add up.

3. There was no reason to present additional evidence of defendant's injuries and no actual prejudice in not doing so.

Defendant claims counsel should have presented medical testimony and evidence of his injuries to show he could not have escaped from the scene as Lemon claimed he did.

Cross's conclusion that defendant's physical condition was not relevant to an alibi was a sound decision. 113a. Defendant was not concerned enough about his injuries to have the MRI ordered by Dr. T performed. 94a. Defendant came and went from his appointments with no wheelchair or cane. Most importantly, the intruders in Lemon's home were locked inside. They had just committed armed robbery and shot someone and needed to escape quickly. The obvious possibility that it would have hurt defendant had he jumped out of the window and landed four feet

[97] 302b, ¶ 5.

below (97a) would not have prevented him from doing so in a rush to escape. In other words, the possibility—even likelihood—that jumping out the window would have hurt does not equate (at all) with being physically unable to flee a crime scene. Even someone with limited mobility and difficulty walking could have done what the intruders did if his life depended on it: climb over a broken picture window, drop to the ground, and worry about any pain later after escaping. Defendant's preexisting injury had little to no probative value. There was no outcome-determinative prejudice in not having the testimony of the medical witnesses.

D. There is no reasonable probability that but for the admission of defendant's armed-robbery convictions he would have been acquitted.

Armed robbery has been found to be probative of veracity under MRE 609.[98] Defendant argued counsel was ineffective for eliciting from him on direct exam that he had previously been convicted of crimes ("priors"), and allowing the prosecutor to then inquire on cross-exam about the exact number (five) and nature (armed robbery) of such convictions.[99] 153-154b.

1. There was no error here.

Defendant did not have a trial court ruling under MRE 609(b) regarding the priors' admissibility before deciding whether to testify. It is fairly clear, though, that Cross had told him

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[98]*People v Minor*, 170 Mich App 731, 736 (1988). MRE 609 is attached at 356b.

[99]Two of defendant's five prior convictions were for assault with intent to rob while armed, not armed robbery. The armed-robbery statute was revised by 2004 PA 128 to include attempts within the statutory definition of the crime, *People v Williams*, 491 Mich 164, 172, 184 (2012), so, for purposes of credibility, they would all be probative under MRE 609 if otherwise admissible. In this brief, all five priors are referred to as armed-robbery convictions.

This writer corresponded with a records specialist at the Michigan Department of Corrections (MDOC), who confirmed that defendant is still serving the sentences for his three 1989 armed robbery convictions and two 1994 convictions for assault with intent to rob while armed, in addition to the four current sentences. This is so because after defendant was released on parole in November 1993 and again in June 2008 (after returning to prison in April 1995), he violated parole both times and returned to continue serving his sentences. Due to the parole violations, his sentences became consecutive and all are currently active.

the priors would be discussed; this was the very first line of questioning defendant faced on direct exam. 141-142b. And the few direct-exam questions regarding the convictions were leading, again suggesting counsel and defendant had discussed them ahead of time and defendant still chose to take the stand. 141-142b.[100]

Further, in *People v Bartlett*,[101] the Court of Appeals ruled a prior conviction was probative and properly admitted despite finding it may have caused "some chilling effect" and "some prejudice[.]" Likewise, in *People v Minor*,[102] the Court of Appeals addressed the admission of the specific crime of armed robbery when that defendant faced the same charge, as here. Although finding the prior conviction prejudicial because the evidence was not overwhelming (in contrast to this case), the Court still found armed robbery to be probative of veracity: "The crime of robbery…contains an element of theft and it is our view that a person who is willing to deprive others of their property is likely to be a person who does not tell the truth."[103]

Regarding the prejudicial effect analysis under MRE 609, while the convictions were the same as the armed-robbery charge defendant faced, he still elected to testify, so there was no

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[100]*Cf.* to *People Crawford*, 83 Mich App 35 (1978), where the trial court ruled defendant, charged with armed robbery, could be impeached with two prior armed robbery convictions. While the Court of Appeals reversed his conviction and remanded for a new trial, it did so because defendant chose not to take the stand: "The court implicitly recognized that defendant could testify and be impeached with two prior armed robbery convictions [] or forego testifying and deprive the jury of his side of the story []. Defendant did not testify or otherwise present a defense. To fail to suppress defendant's prior armed robbery convictions was an abuse of discretion requiring reversal in this case." 83 Mich App 39-40. In contrast, defendant here did testify and present his side of the story.

[101]*People v Bartlett*, 197 Mich App 15, 20 (1992)(theft crime of breaking and entering; defendant on trial for delivery of cocaine).

[102]*People v Minor*, 170 Mich App 731 (1988).

[103]*Minor*, 170 Mich App at 736, discussing *People v Allen*, 429 Mich 558 (1988).

"chilling effect."[104] In fact, Cross confirmed in his closing argument that this had been the strategy all along:

> [MR. CROSS:] The funny thing about criminal cases is the standard of proof, which is on the prosecutor and not on my client, who has a right to not testify or present any evidence. But he had the courage, understanding that his conviction, his prior convictions would come out, said I'm going to get on the stand and testify about the truth. He was not there. Understanding that the prosecutor would probably try to paint him as a bad guy because of his prior convictions. He understood that. I understood that. There's nothing we can do about that because that is what the situation is.
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> But that doesn't necessarily mean, that does not mean at all, and the Judge told you this, he'll tell you again, and I told you once before, that doesn't mean because you're a bad guy in the past that you are a bad guy in terms of that you've been accused of, and in terms of that you did it or not. [165b-166b.]

It was trial strategy to elicit the priors immediately to take the wind out of the prosecution's sails on this point.[105]

2. The trial court improperly granted relief for defendant's IAC-appellate claim, because it failed to find "actual prejudice" under MCR 6.508(D)(3)(b).

Without conceding the point, the People will assume for argument's sake that appellate counsel erred by not addressing the merits of the MRE-609 issue on appeal, and that the trial court is correct that this error constitutes "good cause" under MCR 6.508(D)(3)(a) for not raising the issue in his appeal of right. Even so, the trial court abused its discretion by skipping the "actual prejudice" step in the MFRJ analysis.

The trial court did not even mention appellate counsel in its first opinion of 11-3-15, or find that he erred, and so much so that he was ineffective. 336-341b. Significantly, while finding appellate counsel ineffective in its second opinion, the trial court still did not cite to any of his

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[104]*Bartlett*, 197 Mich App at 20.

[105]Defendant has never claimed the prosecutor used the prior convictions improperly in her closing argument and, in fact, she did not. 163-164b.

Ginther testimony. It found he was ineffective for failing to properly address the MRE-609 claim after the *Hewitt I* Court had found appellate counsel did not address the merits of the issue and thus the claim was abandoned:

> [B]y failing to "address the merits" of defendant's central argument on appeal, appellate counsel was ineffective. Consequently, this abandoned claim resulted in absolute prejudice to defendant. Thus, Defendant has established "good cause," which would excuse his apparent failure to raise the above-mentioned issues on appeal and "actual prejudice," via the ineffective assistance of appellate counsel. [14a.]

In making the above findings, the trial court drew legal conclusions (e.g., "absolute prejudice"[106] and "actual prejudice") without supporting them. The alleged error did not automatically prove "actual prejudice" under MCR 6.508(D)(3)(b). The trial court failed to discuss how the MRE-609 issue resulted in actual prejudice, given the contrast in credibility between Lemon's and defendant's trial testimony.

Even if, as the trial court claimed, the 609 issue were defendant's "central argument on appeal"[107] and counsel erred by not addressing it, this does not mean it was a *winning* argument, as shown below.

3. Even assuming error, there was no actual prejudice due to the credible eyewitness identification and defendant's unbelievable testimony.

Even if a defendant establishes errors, he "must show that they actually had an adverse effect on the defense."[108] Defendant has not shown that but for the alleged error of admitting his

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[106]Perhaps the trial court used this term for emphasis, but there is no ineffective-assistance or MFRJ standard which uses it. Further, using this conclusory term begs the question of *why* the alleged error was likely outcome determinative under either *Strickland* or MCR 6.508(D)(3)(b)(i).

[107]And not, for example, the alleged failure to investigate defendant's alibi. Quoted language is found at 14a.

[108]*Strickland*, 466 US at 693.

prior convictions he would have been acquitted. It is not enough for a defendant to show the errors had "some conceivable effect on the outcome."[109] An error, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[110]

Here there was no prejudice. Lemon immediately and unequivocally identified defendant, whom he already knew, to the responding officers. Further, defendant made a choice to testify, and his testimony was so nonsensical it proved his alibi was false and that he was a liar. The jury would have heard this testimony and come to this conclusion whether or not the convictions were admitted. So, the most damaging, incriminating evidence at trial was not the admission of defendant's prior convictions; it was Lemon's convincing testimony and defendant's choice to lie on the stand and tell an unbelievable story.[111]

In conclusion, the trial court abused its discretion in granting relief when no actual prejudice was shown. *Hewitt II* got it right, and defendant's application should be denied.

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[109]*Strickland*, 466 US at 693.

[110]*Strickland*, 466 US at 693.

[111]Defendant relies on *People v Brown*, 491 Mich 914 (2012). In that order, the Michigan Supreme Court granted relief because the victim's testimony at trial contradicted her preliminary exam testimony and initial statement to the police, and trial counsel failed to pursue this on cross-examination. Here, in contrast, there were no such inconsistencies with Lemon's account (there was an additional basis for the relief in *Brown* which also does not apply here: failure to request and admit certain records which were exculpatory).

RELIEF

WHEREFORE, the People respectfully request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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